IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARC SMITH, et al.,	:	
Plaintiffs,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
COUNTY OF BUCKS, et al.,	:	**No. 03-6238**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **April 19, 2004**

Plaintiffs Marc Smith and Jolanthe Roscoe bring this civil rights action against the County of Bucks and various county personnel for damages related to health care that Plaintiff Smith received while incarcerated in the Bucks County Correctional Facility ("BCCF"). Presently before the Court is a motion to dismiss filed by the County of Bucks, the Director of the Bucks County Department of Corrections Harris Gubernick, and BCCF Warden Willis Morton (collectively the "County Defendants"), and a motion to dismiss or in the alternative for summary judgment filed by the Medical Director of the Department of Health Lewis Polk and the Director of the Department of Health Gordon Ehrlacher (collectively the "Medical Defendants"). For the reasons set out below, the Court grants in part and denies in part the County Defendants' motion to dismiss and grants in part and denies in part the Medical Defendants' motion for summary judgment.

I. BACKGROUND

For the purposes of the instant motions, the following facts are set out in a light most favorable to Plaintiffs. At some point during 2001, Plaintiff Smith was examined by a private

physician who recommended that Smith have a biopsy of a mole on his chest. (Compl. ¶ 17.) In October of that year, prior to any biopsy being conducted, Smith was incarcerated in BCCF. (*Id.* ¶ 15.) In January 2002,[1] he informed the medical personnel in the BCCF infirmary—who are unserved John and Jane Doe defendants in this case—that he was concerned about the mole and that his physician had previously recommended a biopsy. (*Id.* ¶ 17.) The medical personnel, without conducting any tests, told Smith that the mole was not cancerous and treated him by placing a bandage over it. (*Id.* ¶ 18.) Between January and May 2002, Smith repeatedly complained to the infirmary staff that the mole had grown and was bleeding, but they did not permit him to receive a biopsy. (*Id.* ¶¶ 19-22.) Also during this time, Smith contacted his mother, Plaintiff Roscoe, who attempted to obtain permission from "all prison supervisory personnel, including the defendant warden" for her son to receive a biopsy. (*Id*. ¶ 23.) Roscoe's attempts were unsuccessful until she contacted an acquaintance who is or was a Bucks County official. (*Id.* ¶ 24.) This official placed a call to Defendant Morton on Roscoe's behalf, and Morton then allowed Smith to be transported to the hospital. (*Id.*) By this time, the mole had reached the size of a golf ball, and the hospital quickly confirmed that it was cancerous. (*Id.* ¶¶ 25-26.) Smith received this diagnosis in late May or early June 2002, and was paroled soon thereafter. (*Id.* ¶¶ 26-27.) Although Smith was treated for cancer throughout the next year, this treatment was ultimately unsuccessful. (*Id.* ¶¶ 29-36.) Smith died on January 11, 2004, approximately two months after he and Roscoe filed the instant suit.

Plaintiffs' suit presents four claims: Count I, brought pursuant to 42 U.S.C. § 1983, asserts that Defendants violated Smith's Eighth Amendment right to be free from cruel and unusual

[1] The Complaint states that this first visit to the BCCF infirmary occurred in January 2001, but given that Plaintiff had not yet been incarcerated at that time, it appears that this statement is erroneous.

punishment; Count II alleges unspecified violations of the Pennsylvania Constitution; Count III is a state-law claim for intentional infliction of emotional distress; and Count IV is a claim brought by Plaintiff Roscoe for loss of her son's consortium. Both groups of moving Defendants seek to dismiss all four of these Counts as well as Plaintiffs' demand for punitive damages.

II. COUNTY DEFENDANTS' MOTION TO DISMISS

A. Standard of Review

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must accept as true all of the factual allegations pleaded in the complaint and draw all reasonable inferences in favor of the non-moving party. *See Bd. of Trs. of Bricklayers & Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 272 (3d Cir. 2001). A motion to dismiss will only be granted if it is clear that relief cannot be granted to the plaintiff under any set of facts that could be proven consistent with the complaint's allegations. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (*citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).[2]

B. Discussion

1. Count I: Violation of the Eighth Amendment

Plaintiffs' § 1983 claim alleges that Defendants violated the Eighth Amendment prohibition

[2] Although both sets of Defendants argue that the Court should impose heightened pleading requirements upon Plaintiffs' claims (*see, e.g.*, County Defs.' Mot. at 21; Med. Defs.' Mot. at 24-25), this argument has been unquestionably rejected in the context of civil rights cases. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (rejecting heightened pleading standard).

on cruel and unusual punishment by failing to allow Smith to receive a biopsy between January and May of 2002. In order to show liability pursuant to § 1983, Plaintiffs must demonstrate that Smith's constitutional rights were violated by persons acting under color of state law. 42 U.S.C. § 1983. As Defendants do not contest that the state action requirement is satisfied, the question at issue is whether Plaintiff has properly alleged an Eighth Amendment violation.

An Eighth Amendment violation occurs when state actors act with "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that plaintiff's allegation that prison doctors should have performed certain diagnostic tests instead of the tests actually performed did not state claim under § 1983).[3] "In order to establish a violation of [a prisoner's] constitutional right to adequate medical care, evidence must show (i) a serious medical need, and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need." *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 582 (3d Cir. 2003). The inquiry into whether the prisoner had a serious medical need is objective; the deliberate indifference inquiry is subjective. *Montgomery v. Pinchak*, 294 F.3d 492, 499 (3d Cir. 2002). A serious medical need is one that "has been diagnosed by a physician as requiring treatment or . . . is so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (collecting cases). In order to make out a case of deliberate indifference, the plaintiff is required to show that the defendant "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety." *Natale*, 318 F.3d at 582 (*citing Farmer*

[3] In a statement potentially relevant to the instant case, the Supreme Court also noted that the framers of the Eighth Amendment were particularly concerned with situations in which lack of medical care caused prisoners "a lingering death." *Estelle*, 429 U.S. at 103 (quotations omitted).

v. Brennan, 511 U.S. 825, 837 (1994)). However, "in the medical context, [neither] an inadvertent failure to provide adequate medical care [nor] . . . negligen[ce] in diagnosing or treating a medical condition" state a cause of action. *Estelle*, 429 U.S. at 105-06. Thus, the Third Circuit has found deliberate indifference "in situations where 'necessary medical treatment is delayed for non-medical reasons.'" *Natale*, 318 F.3d at 582 (*quoting Monmouth County*, 834 F.2d at 347).

The County Defendants move to dismiss Plaintiffs' § 1983 claim on the grounds that: (a) there was no underlying violation of Smith's constitutional rights; (b) individual defendants Gubernick and Morton are not alleged to have taken any actions that would subject them to personal liability; (c) Gubernick and Morton are entitled to qualified immunity; and (d) Plaintiffs cannot make out a case of municipal liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

Regarding the underlying constitutional violation, accepting Plaintiffs' allegations as true and drawing all factual inferences therefrom in their favor, the Complaint properly alleges an Eighth Amendment violation. Specifically, Plaintiffs allege that Smith informed the prison medical staff about his painful, bleeding, and growing skin problem, and Roscoe contacted all of the prison supervisors with the same information, yet Smith was consistently denied the minimal medical treatment that might have saved his life. (Compl. ¶¶ 19-24.) From these allegations alone, a reasonable factfinder could infer both an objectively serious medical condition and deliberate indifference to that condition, thus meeting the Third Circuit's standard for pleading Eighth Amendment medical violations. *See, e.g., Natale*, 318 F.3d at 582-83 (holding that standard was satisfied where diabetic prisoner informed nurse of his need for insulin but was not given it for 21 hours); *Montgomery*, 294 F.3d at 500-501 (reversing magistrate judge's determination that HIV-positive prisoner's allegation that prison staff failed to give him proper tests and treatment was

without merit). In addition, Plaintiffs allege that Morton's refusal to allow treatment was not grounded in any medical consideration but was instead entirely capricious, as evidenced by his acquiescence upon being contacted by a Bucks County official. This allegation is also sufficient to make out a claim of deliberate indifference to Smith's health. *See Natale*, 318 F.3d at 582 (noting that allegation that "necessary medical treatment [was] delayed for non-medical reasons" states claim under § 1983). These allegations therefore satisfy the pleading requirements for Eighth Amendment claims, and County Defendants' motion to dismiss the § 1983 claim for lack of an underlying constitutional violation is accordingly denied.

Second, County Defendants argue that Gubernick and Morton are not alleged to have taken any actions that would subject them to personal liability under § 1983. In order to state a cause of action against these Defendants in their individual capacities, Plaintiffs must allege that Gubernick and Morton either directed the constitutional violation to occur or knew that it was occurring and acquiesced thereto. *Baker v. Monroe Township*, 50 F.3d 1186, 1200 (3d Cir. 1995) (setting out Third Circuit's "well established standard for individual liability" under § 1983). Plaintiffs have met their burden by alleging that Roscoe contacted "all prison supervisory personnel, including the defendant warden" regarding her son's medical condition. (Compl. ¶ 23.) If this allegation is true, meaning that Gubernick and Morton were apprised of Smith's condition by Roscoe and still refused to allow a biopsy, Plaintiffs could meet their burden of demonstrating these Defendants' direction of—and/or acquiesence to—actions that violated Smith's Eighth Amendment rights, as discussed above. Thus, the Complaint states a claim upon which relief might be granted against Gubernick and Morton in

their individual capacities, and their motion to dismiss the § 1983 claim is denied.[4]

Third, Gubernick and Morton assert that they are entitled to qualified immunity. The issue of qualified immunity is a "matter[] of law for the court to decide . . . at the earliest possible stage of the litigation." *Bartholomew v. Pennsylvania*, 221 F.3d 425, 428 (3d Cir. 2000) (internal citation omitted). The doctrine of qualified immunity provides that "[g]overnment officials performing discretionary functions are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir.1997) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [T]he very action in question [need not have] previously been held unlawful, but . . . in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citation omitted).

In this case, Plaintiffs allege that Gubernick and Morton were informed of Smith's potentially life-threatening medical condition but refused to permit him to receive a biopsy. As discussed previously, this allegation, if true, states a claim for a violation of Smith's Eighth Amendment right to be free of cruel and unusual punishment. Under Third Circuit caselaw, a seriously ill inmate has a "clearly established" right to necessary medical care. *See Natale*, 318 F.3d at 582-83; *Montgomery*, 294 F.3d at 500-501; *Parham v. Johnson*, 126 F.3d 454, 458 n.7 (3d Cir. 1997) (holding that where prisoner with severe ear problems was repeatedly given same dangerous

[4] The Court cautions, however, that Plaintiffs will not be permitted to rely upon these vague assertions regarding "all personnel" to defeat a motion for summary judgment.

prescription for 114 days, thus causing prisoner visible physical distress, district court erred in determining that claim was without merit). Any "reasonable official"—i.e. any warden and county corrections director—would know that the denial of medical treatment in such circumstances is in contravention of the Eighth Amendment. Thus, County Defendants are not entitled to qualified immunity at this stage in the proceedings because Plaintiffs have alleged that these Defendants violated a clearly-established constitutional right of which they reasonably should have known.[5]

Finally, the County of Bucks seeks to dismiss Plaintiffs' *Monell* claim. Under *Monell*, a plaintiff must show that the violation of his constitutional rights occurred as a result of a municipality's policy or custom. *Monell*, 436 U.S. at 694. The County does not argue that Plaintiffs have failed to properly plead this general *Monell* standard; rather, the County cites *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988), to argue that Third Circuit caselaw prohibits a finding of municipal liability where the municipal entity is not alleged to have had "personal" involvement in the tortious activity. The County's reliance upon *Rode*, however, is misplaced. That case stands for the proposition that certain high-level supervisory officials cannot be held individually liable for constitutional violations in which they had no personal involvement. *Id.*, 845 F.2d at 1207-08 (discussing individual liability of Governor and state Attorney General). This holding clearly relates only to individual-capacity defendants, and neither *Monell*, nor *Rode*, nor any other caselaw of which the Court is aware places an equivalent burden on Plaintiffs to show that a municipality had "personal" involvement in the allegedly tortious acts.[6] Therefore, the County's

[5] County Defendants are not precluded from raising the issue of qualified immunity again in a motion for summary judgment if the facts uncovered during discovery so warrant.

[6] Indeed, it would be nonsensical to speak of a governmental entity having "personal" involvement in any action, which is why *Monell* claims focus upon governmental policies and

motion to dismiss the *Monell* claim is denied.

Thus, all of their arguments being without merit, County Defendants' motion to dismiss Count I of the Complaint is denied.

2. Count II: Violations of the Pennsylvania Constitution

Plaintiffs concede that they have no cause of action under the Pennsylvania Constitution.[7] Accordingly, the Court grants County Defendants' motion to dismiss Count II of the Complaint.

3. Count III: Intentional Infliction of Emotional Distress

Count III of the Complaint asserts a state-law claim of intentional infliction of emotional distress against all Defendants. Under Pennsylvania law, as determined by the Third Circuit, the elements of this tort are that: "(1) The conduct must be extreme and outrageous; (2) the conduct must be intended; (3) the conduct must cause emotional distress; and (4) the distress must be severe." *Silver v. Mendel*, 894 F.2d 598, 606 n.16 (3d Cir. 1990); *see also Olender v. Township of*

---

customs. Furthermore, even if the County had cited *Rode* in the more relevant context of the individual liability claims against Gubernick and Morton, that argument would also have failed, for the Third Circuit has explicitly distinguished *Rode* as applying only to statewide office holders with thousands of subordinates, not to local officials with much smaller staffs. *See Atkinson v. Taylor*, 316 F.3d 257, 271 (3d Cir. 2003) (holding that *Rode* applied neither to defendant who was "charged with oversight of a specific state entity responsible for housing prisoners" nor other defendants who had "even narrower responsibilities as links in a chain of command within a single prison" because these defendants' "responsibilities are much more narrow than that of a governor or state attorney general, and logically demand more particularized scrutiny of individual complaints").

[7] Count II of the Complaint states that "[t]he acts and conduct of the Defendants alleged in [this] action constitute civil rights violations under the Constitution and laws of the Commonwealth of Pennsylvania." (Compl. ¶ 58.) It their responses to the instant motions, however, Plaintiffs state that they "in Count II of their Complaint have not . . . pleaded any civil rights violations under the Constitution of the Commonwealth of Pennsylvania" (Pls.' Resp. to County Defs.' Mot. at 25; Pls.' Resp. to Med. Defs.' Mot. at 23), and therefore have no objection to their being dismissed.

Bensalem, 32 F. Supp. 2d 775, 791-92 (E.D. Pa. 1999) (stating second element as requiring "intentional or reckless" conduct); *Stouch v. Bros. of Order of Hermits of St. Augustine*, 836 F. Supp. 1134, 1145 (E.D. Pa. 1993) (same).

The County Defendants move to dismiss Count III, arguing, inter alia, that they are statutorily immune from such claims under 42 PA. CONS. STAT. ANN. §§ 8541, 8545, which provide wide immunity to local government agencies and their employees. Plaintiffs respond that Defendants' immunity is abrogated by 42 PA. CONS. STAT. ANN. § 8550, which provides that statutory immunity does not apply if the allegedly tortious acts in question are determined to constitute "a crime, actual fraud, actual malice, or willful misconduct."

Plaintiffs argue that the County Defendants' alleged actions constitute "willful misconduct" under § 8550, and they refer the Court to the allegations contained within Count III of the Complaint. Count III of the Complaint, however, alleges that Defendants acted "with *deliberate indifference* to the medical needs of [P]laintiff Marc Smith." (Compl. ¶ 60 (emphasis added).) As this District has held, in a thorough analysis of Pennsylvania law conducted by Judge Pollak, an allegation of deliberate indifference on the part of the state actors may be sufficient to make out a § 1983 claim, but it does not provide a basis for invoking the "willful misconduct" exception of § 8550. *Owens v. City of Philadelphia*, 6 F. Supp. 2d 373, 394-95 (E.D. Pa. 1998) (holding that state actors were subject to § 1983 claim but immune from state-law claims where plaintiff showed only that defendants acted with deliberate indifference); *cf. DiSalvio v. Lower Merion High Sch. Dist.*, 158 F. Supp. 2d 553, 561-62 (E.D. Pa. 2001) (permitting plaintiff to pursue intentional infliction of emotional distress claim where she alleged defendant acted with specific intent to cause her harm). Thus, because Plaintiffs' claim for intentional infliction of emotional distress alleges no more than

deliberate indifference on the part of Defendants, § 8550 does not apply, and Defendants are immune from this claim under 42 PA. CONS. STAT. ANN. §§ 8541, 8545. Accordingly, the County Defendants' motion to dismiss Count III is granted.

4. Count IV: Loss of Consortium

Plaintiff Roscoe asserts a state-law claim for loss of consortium due to her son's death. The County Defendants seek to dismiss this claim, arguing that Pennsylvania does not recognize such a cause of action when brought by a parent for the loss of his or her children. Plaintiffs cite *Estate of Bailey by Oare v. York County*, 768 F.2d 503 (3d Cir. 1985) and *Fields v. Graff*, 784 F. Supp. 224 (E.D. Pa. 1992) for the contrary proposition that "filial consortium" is a valid claim in Pennsylvania. Neither of these cases, however, supports Plaintiffs' argument. Instead, the Third Circuit held in *Bailey* that "a parent whose child has died as a result of unlawful state action may maintain an action *under § 1983*." *Bailey*, 768 F.2d at 509 n.7 (emphasis added).[8] In *Fields*, Judge Gawthrop plainly stated that "Pennsylvania recognizes no . . . cause of action for a parent's loss of a child's consortium," *Fields*, 784 F. Supp. at 227, but he declined to grant a motion to dismiss the suit due to his stated hope that Pennsylvania would come to recognize such claims soon thereafter. *Id.* ("One never knows . . . how the common and statutory law of Commonwealth will have evolved by time of trial . . . ."). Judge Gawthrop also noted that if state law did not change, he would grant a renewed motion to dismiss. *Id*. at 228 ("[B]ecause of the potential for a change in the law before this case runs its course, I shall not today grant the motion. I shall, however, do so just before trial, . . . should

[8] Plaintiffs also fail to note that *Bailey* was overruled by the Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989). *See Phila. Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 167 (3d Cir. 1989) ("*DeShaney* overrules this court's opinion in [*Bailey*].").

the law in the interim not have evolved."). As the Superior Court of Pennsylvania recently noted, the state still does not recognize filial consortium claims. *Cheskiewicz v. Aventis Pasteur, Inc.*, --- A.2d ---, 2004 WL 326693, at *7 (Pa. Super. Ct. Feb. 23, 2004) ("[O]ur jurisprudence . . . recognizes no cause of action for a parent's loss of a child's consortium."). Thus, Count IV states a noncognizable claim, and County Defendants' motion to dismiss it is granted.

III. MEDICAL DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

A. Conversion of Motions Pursuant to Rule 12(b)(6)

Before discussing the standard of review applicable to the instant motion, the Court must first determine whether the Medical Defendants' motion should be considered a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure or a motion for summary judgment under Rule 56. Rule 12(b) provides that "[i]f, on a motion [under Rule 12(b)(6)], matters outside the pleading are presented to the court, the motion shall be treated as one for summary judgment . . . and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion." FED. R. CIV. P. 12(b). In the normal "conversion" situation, the 12(b)(6) movant presents its motion with evidentiary attachments, and the Court issues a notice to the parties of the conversion to a Rule 56 motion. *See* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1366 (2d ed. 1990 & Supp. 2003). The Third Circuit has consistently held, however, that where a defendant's motion is specifically denominated as a motion for dismissal or in the alternative summary judgment and contains "matters outside the pleading" to which the plaintiff does not object, the Court may consider the motion as one for summary judgment without additional notice

to the parties, especially if the plaintiff's response also contains external materials. *Hilfirty v. Shipman*, 91 F.3d 573, 578-79 (3d Cir. 1996) (holding that district court did not err in considering under Rule 56 motion for dismissal or alternatively summary judgment where plaintiff responded in kind without objection); *Scott v. Graphic Communications Int'l Union, Local 97-B*, --- F.3d ---, 2004 WL 516164 at *2, 2004 U.S. App. LEXIS 4979 at *14-16 (3d Cir. Mar. 17, 2004) (same); *In re Rockefeller Ctr. Props., Inc., Sec. Litig.*, 184 F.3d 280, 288-89 (3d Cir. 1999) ("*Hilfirty* explicitly states that the 'primary reason' notice was deemed adequate was that some of the motions to dismiss had been framed in the alternative as motions for summary judgment."); *see also* WRIGHT & MILLER, *supra*, § 1366 n.26.

In this case, the Medical Defendants explicitly denominate their motion as being a motion for dismissal or in the alternative summary judgment, and they attach external materials, including Plaintiff's deposition transcript and his prison medical records. Plaintiffs' response also appends external material—Smith's deposition—and cites to it repeatedly.[9] Thus, this case is factually indistinguishable from *Hilfirty*, and the Court therefore considers Medical Defendants' motion under Rule 56.

B. Standard of Review for Motions for Summary Judgment

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c) (1994); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving

[9] Plaintiffs also append the deposition transcript to their response to the County Defendants' motion to dismiss. However, because that response motion does not cite to the deposition for any proposition not already alleged in the Complaint, and because the County Defendants do not move for summary judgment, the Court excludes the transcript from Plaintiffs' response and therefore need not convert this motion pursuant to Rule 12(b).

party does not bear the burden of persuasion at trial, that party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Anderson*, 477 U.S. at 248. In order to meet this burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on mere allegations, conclusory or vague statements, or general denials in the pleadings. *Celotex*, 477 U.S. at 324. In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp*., 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in ruling upon the motion. *See Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

C. Discussion

1. Count I: Violation of the Eighth Amendment

As discussed previously, an Eighth Amendment violation occurs when state actors act with "deliberate indifference to serious medical needs of prisoners." *Estelle*, 429 U.S. at 104. The Medical Defendants move for summary judgment on Plaintiffs' Eighth Amendment claims, arguing that it undisputed that the Medical Defendants had no knowledge of the facts underlying this case and are therefore entitled to judgment as a matter of law on the issue of deliberate indifference. Plaintiffs attempt to highlight factual disputes by citing portions of Smith's deposition in which he discusses his medical complaints to prison personnel. However, there is no factual statement in this

deposition—nor even an allegation in the Complaint—that the Medical Defendants themselves had or should have had any knowledge whatsoever of Smith's condition. In fact, as Plaintiffs concede, their evidence does not even *mention* these Defendants, either by name or title. Therefore, Plaintiffs have not produced even a scintilla of evidence that the Medical Defendants were deliberately indifferent to Smith's health. Accordingly, the only possible claim that Plaintiffs could assert against these Defendants in their individual capacities under § 1983 would be for supervisory liability, arguing that they affirmatively promulgated a policy that led to violation of Smith's Eighth Amendment rights. *See Mabine v. Vaughn*, 25 F. Supp. 2d 587, 592 (E.D. Pa. 1998) (discussing supervisory liability under § 1983); *see also Sample v. Diecks*, 885 F.2d 1099, 1117-18 (3d Cir. 1989) (setting out elements of supervisory liability claim). Once again, however, Plaintiffs provide no factual basis whatsoever for such a claim; in fact, there is not even an allegation of supervisory liability in their Complaint or their response to the summary judgment motion.[10] Thus, because it is undisputed that the Medical Defendants had no knowledge of Smith's medical condition, and because Plaintiffs make no allegation and provide no evidence of supervisory liability under § 1983, summary judgment is granted to Defendants Polk and Ehrlacher in their individual capacities regarding Plaintiffs' federal constitutional claims.[11]

---

[10] In addition, the Court finds incongruous the notion that supervisory liability based upon actions taken by a defendant in a purely policymaking capacity could ever be grounds for individual liability in a § 1983 suit. *But see Ingalls v. Florio*, 968 F. Supp. 193, 197 (D.N.J. 1997) ("Promulgation of an offending policy or procedure amounts to sufficient personal participation in the constitutional violation to give rise to individual liability on the part of the supervisory official.").

[11] Plaintiffs argue that their claims should be allowed to proceed through the discovery phase so that they may uncover facts showing Medical Defendants' individual liability. Although this is often a valid argument in § 1983 cases—and the Court accepts it herein with regard to the County Defendants—Plaintiffs vitiated their own request by responding to the

2. Count II: Violations of the Pennsylvania Constitution

As stated above, Plaintiffs concede that they have no cause of action under the Pennsylvania Constitution. Accordingly, the Medical Defendants' motion for summary judgment on Count II of the Complaint is granted.

3. Count III: Intentional Infliction of Emotional Distress

The Medical Defendants move for summary judgment on Plaintiffs' claim for intentional infliction of emotional distress. Plaintiffs' response regarding this claim is identical to their response to the County Defendants' motion. Thus, given that Plaintiffs have not alleged a cause of action sufficient to overcome the hurdle of statutory immunity even for purposes of a motion to dismiss, as discussed above, and further given that the Medical Defendants have provided Smith's deposition as unrefuted evidence tending to show they had no personal involvement whatsoever in Smith's health care, the Medical Defendants' motion for summary judgment must be granted.

4. Count IV: Loss of Consortium

As stated above, Pennsylvania does not recognize a parent's claim for loss of a child's consortium. Accordingly, the Medical Defendants' motion for summary judgment on Count IV of the Complaint is granted.

IV. PUNITIVE DAMAGES

Finally, the County Defendants argue that Plaintiffs' demands for punitive damages should be dismissed, and the Medical Defendants move for summary judgement thereon. Plaintiffs concede that punitive damages are not available against the County or the official-capacity defendants. (Pls.'

---

motion as one for summary judgment instead of as a motion to dismiss.

Resp. to County Defs.' Mot. at 28.) Thus, as a result of the rulings above, the only remaining claim at issue with regard to punitive damages is the § 1983 claim against the County Defendants in their individual capacities.

Section 1983 provides that punitive damages are available against an individual-capacity defendant who acted with "reckless or callous disregard for the plaintiff's rights." *Smith v. Wade*, 461 U.S. 30, 51 (1983). In Count I of the Complaint, after outlining the underlying facts of Smith's medical treatment at BCCF, Plaintiffs allege that Defendants' refusal to allow a biopsy was, inter alia, "reckless." (Compl. ¶¶ 44.) Although this allegation is vague and unsubstantiated, Plaintiffs need not provide proof of recklessness to survive a motion to dismiss; it is sufficient that they allege recklessness and that the factual allegations they make support an inference thereof. In light of this standard, it is not clear to the Court that no reasonable factfinder could infer malice from the fact that the County Defendants were informed of Smith's life-threatening condition and refused to permit a simple test. Thus, the Court will not dismiss Plaintiffs' claims for punitive damages against the individual-capacity County Defendants at this time.

V. CONCLUSION

For the reasons stated above, the Court grants in part and denies in part the County Defendants' motion, and grants the Medical Defendants' motion for summary judgment in all respects except as to the § 1983 claim against them in their official capacities. To summarize the claims that remain in this case: (1) Count I remains as to Harris Gubernick and Willis Morton in their individual and official capacities, Lewis Polk and Gordon Ehrlacher in their official capacities only, the County of Bucks, and the unserved defendants; and (2) Count III remains as to the unserved

defendants only. In addition, the demand for punitive damages remains only as to the individual-capacity Count I claims and the Count III claims against the unserved defendants. An appropriate Order follows.[12]

[12] The Court recommends, but does not order, that the parties stipulate to the dismissal of Defendants Polk and Ehrlacher, whose inclusion in their official capacities only appears superfluous in light of the § 1983 claim against the County itself. In addition, in light of counsel for all parties having repeatedly misrepresented irrelevant and overruled cases as binding precedent—examples of which, although not a comprehensive list, are noted above—the Court reminds counsel of their obligations under Fed. R. Civ. P. 11(b)(2) and Pennsylvania Disciplinary Rule 3.3(a).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARC SMITH, et al.,	:	
Plaintiffs,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
COUNTY OF BUCKS, et al.,	:	**No. 03-6238**
Defendants.	:	

ORDER

AND NOW, this **19th** day of **April, 2004**, upon consideration of Defendants County of Bucks, Harris Gubernick, and Willis Morton's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Document No. 8), Defendants Lewis Polk and Gordon Ehrlacher's Motion to Dismiss Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) or Alternatively for Summary Judgment Pursuant to Federal Rule of Civil Procedure 56(b) (Document No. 9), and Plaintiffs' responses thereto, it is hereby **ORDERED** that:

1. Defendants County of Bucks, Harris Gubernick, and Willis Morton's Motion is **GRANTED in part** and **DENIED in part**, as follows:

    a. Counts II, III, and IV of the Complaint are **DISMISSED** with regard to these Defendants.

    b. Plaintiffs' demand for punitive damages is **DISMISSED** with regard to the County of Bucks and Defendants Gubernick and Morton in their official capacities.

    c. In all other respects, Defendants' Motion is **DENIED**.

2. Defendants Lewis Polk and Gordon Ehrlacher's Motion is **GRANTED in part** and **DENIED in part**, as follows:

   a. Summary judgment is **GRANTED** to these Defendants in their individual capacities on Count I of the Complaint.

   b. Summary judgment is **GRANTED** to these Defendants on Counts II, III, and IV of the Complaint.

   c. In all other aspects, Defendants' Motion is **DENIED**.

BY THE COURT:

_____

Berle M. Schiller, J.